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COURT OF CRIMINAL APPEALS
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No. PD-0623-16

TO THE COURT OF CRIMINAL APPEALS

OF THE STATE OF TEXAS

FILED
COURT OF CRIMINAL APPEALS
11/22/2016
ABEL ACOSTA, CLERK

THE STATE OF TEXAS,

Appellant

VS.

ROSA ELENA ARIZMENDI,

Appellee

****

On Discretionary Review from the
Court of Appeals, Seventh District of Texas at Amarillo
No. 07-15-00238-CR, Honorable Patrick A. Pirtle, Judge Presiding

On Appeal from the 108TH District Court
Potter County, Texas in Cause No. 68,589-E
Honorable Doug Woodburn, Judge Presiding

****

APPELLEE'S REPLY BRIEF TO STATE'S BRIEF ON MERIT

****

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IDENTITY OF THE PARTIES AND COUNSEL

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TEX. CRIM. PROC. CODE ANN. ART. 40.001 (West) 10, 12

TO THE HONORABLE COURT OF CRIMINAL APPEALS:

The Counsel for the Appellee respectfully presents his Reply Brief to State's Brief of Merit

STATEMENT REGARDING ORAL ARGUMENT

The Counsel for the State did not request oral argument, and the Court did not grant it.

STATEMENT OF THE CASE

On January 26, 2014, Rosa Elena Arizmendi, hereinafter known as Appellee was a passenger traveling eastbound on I-40 near Bushland in a vehicle being driven by Jose Cortez. Trooper Jered Snelegross executed a traffic stop on the vehicle being driven by Jose Cortez. Appellee was arrested and charged with Possession with Intent to Deliver a Controlled Substance pursuant to TEX. HEALTH & SAFETY CODE ANN. § 481.112 (West). (CR 17). On April 28, 2015, the Appellee plead guilty to a first degree felony Possession with Intent to Deliver a Controlled Substance (CR 33). Appellee was sentenced to 25 years in Texas Department of Corrections as well as a fine of $5,000.00 (RR 1 10). As per her plea agreement with the State of Texas, Appellee signed the waivers that were required by the State of Texas (RR 1 8).

On May 4, 2015, a Motion to Suppress hearing was held in Cause No. 68,587-E, State of Texas v. Jose Cortez. Jose Cortez was the co-defendant of the Appellee. After hearing the testimony of Trooper Jered Snelegross and considering the arguments of the State and the Defendant, Judge Woodburn granted Defendant Jose Cortez Motion to Suppress and suppressed all evidence connected with the traffic stop executed by Trooper Jered Snelegross (Appendix B, Appellee Brief, 07-15-00238-CR, Tex. App. Amarillo 2015). On May 15, 2015, Appellee filed a Motion for New Trial and Motion in Arrest of Judgment. Appellee's Motion for New Trial and Motion in Arrest of Judgment is based on the fact that the trooper's testimony in Cortez Motion to Suppress Hearing is new evidence which was not available or known at the time the movant plead

guilty (CR 45). On June 9, 2015, the hearing on the Appellee's Motion for New Trial and Arrest in Judgment was held in the 108th District Court. After considering the arguments of both the State and the Appellee, the Court granted Appellee's Motion for New Trial on June 12, 2015 (CR 51). The State of Texas filed a Notice of Appeal with the Seventh Court of Appeals on June 22, 2015 (CR 55).

On May 19, 2016, the Seventh Court of Appeals affirmed the decision of the 108th District Court as follows:

> "This "new evidence" in the form of the trooper's testimony could not have been available to her before entering her guilty plea on April 28, 2015, when the trooper's testimony did not exist until her co-defendant's suppression hearing on May 4, 2015. The chronology demonstrates that the failure to obtain the evidence was not due to a lack of due diligence. The trooper's testimony was not cumulative, corroborative, collateral, or impeaching. Considering that Appellee's case was pending in the same trial court as her co-defendant's, the trooper's testimony probably would have resulted in a similar ruling if a motion to suppress had been filed in this case, thus resulting in a different outcome in a new trial. We find that Appellee satisfied the four-prong test for a new trial on the basis of newly discovered evidence. She also articulated a valid claim in her motion—the stop of the van was unlawful, produced new evidence to support that claim, and showed her substantial rights were affected. Accordingly, we conclude the trial court did not abuse its discretion in granting Appellee's motion for new trial on the basis of newly discovered evidence. The State's sole issue is overruled."
>
> *State v. Arizmendi*, 07-15-00238-CR, 2016 WL 2986041, at *3 (Tex. App.—Amarillo May 19, 2016, pet. granted)

The State filed Petition for Discretionary Review with the Court of Criminal Appeals on June 7, 2016. The Court of Criminal Appeals granted the State's Petition for Discretionary Review on September 14, 2016. The State's Brief on the Merits was filed with the court of Criminal Appeals on October 7, 2016. On October 20, 2016, Darrell R. Carey was appointed by the Court of Criminal Appeals as Counsel for the Appellee Rosa Elena Arizmendi.

COUNTER ISSUES PRESENTED

COUNTER ISSUE NO. ONE (A)

APPELLEE IS ENTITLED TO A NEW TRIAL, AS BOTH LOWER COURTS HELD, IN SPITE OF THE FACT THAT SHE WAIVED THE RIGHT TO SEEK A NEW TRIAL.

COUNTER ISSUE NO. ONE (B)

APPELLEE PRESENTED VALID LEGAL CLAIM SUPPORTED BY NEW EVIDENCE NOT PREVIOUSLY AVAILABLE OR DISCOVERABLE WITH DUE DILIGENCE.

SUMMARY OF THE ARGUMENT

COUNTER ISSUE NO. ONE (A).

APPELLEE IS ENTITLED TO A NEW TRIAL, AS BOTH LOWER COURTS HELD, IN SPITE OF THE FACT THAT SHE WAIVED THE RIGHT TO SEEK A NEW TRIAL.

COUNTER ISSUE NO. ONE (B).

APPELLEE PRESENTED VALID LEGAL CLAIM SUPPORTED BY NEW EVIDENCE NOT PREVIOUSLY AVAILABLE OR DISCOVERABLE WITH DUE DILIGENCE.

STATEMENT OF FACTS

On January 26, 2014, Rosa Elena Arizmendi, hereinafter known as Appellee was a passenger traveling eastbound on I-40 near Bushland in a vehicle being driven by Jose Cortez. Trooper Snelegross was on the night shift and noticed a vehicle that passed by his location that the thought was suspicious (Page 10, Appendix B, Appellee Brief, 07-15-00238-CR, Tex. App. Amarillo 2015). The trooper began to follow the vehicle because the vehicle was very clean, had two people in it, and the vehicle was from California and that they were indicators of potential criminal activity (Page 19, Appendix B, Appellee Brief, 07-15-00238-CR, Tex. App. Amarillo 2015). Snelegross moved his vehicle into the left lane of traffic as he traveled behind the vehicle

so that he could observe what was going on in the vehicle (Page 21, Appendix B). Trooper Snelegross has the video turned on his dash cam but did not turn on the audio for his dash cam. The trooper pulls closer to the vehicle so that he can run a manual license plate check on the vehicle driving by Jose Cortez (Page 24, Appendix B). Trooper Snelegross testified that he observed the vehicle cross the fog line and executed a traffic stop on the vehicle being driven by Jose Cortez.

Appellee and Jose Cortez were arrested and charged with Possession with Intent to Deliver a Controlled Substance pursuant to TEX. HEALTH & SAFETY CODE ANN. § 481.112 (West). (CR 17). On April 28, 2015, the Appellee plead guilty to a first degree felony Possession with Intent to Deliver a Controlled Substance (CR 33). Appellee was sentenced to 25 years in Texas Department of Corrections as well as a fine of $5,000.00 (RR 1 10). As per her plea agreement with the State of Texas, Appellee signed the waivers that were required by the State of Texas (RR 1 8).

On May 4, 2015, a Motion to Suppress hearing was held in Cause No. 68,587-E, State of Texas v. Jose Cortez. Jose Cortez was the co-defendant of the Appellee. During the cross examination of Trooper Snelegross, the trooper testified that the video did not clearly show the traffic violations that he observed that caused him to initiate the traffic stop. After hearing the testimony of Trooper Jered Snelegross and considering the arguments of the State and the Defendant, Judge Woodburn granted Defendant Jose Cortez of Motion to Suppress and suppressed all evidence connected with the traffic stop executed by Trooper Jered Snelegross (Appendix B, Appellee Brief, 07-15-00238-CR, Tex. App. Amarillo 2015). On May 15, 2015, Appellee filed a Motion for New Trial and Motion in Arrest of Judgment. Appellee's Motion for New Trial and Motion in Arrest of Judgment is based on the fact that the trooper's testimony in Cortez Motion to

Suppress Hearing is new evidence which was not available or known at the time the movant plead guilty (CR 45). On June 9, 2015, the hearing on the Appellee's Motion for New Trial and Arrest in Judgment was held in the 108th District Court. After considering the arguments of both the State and the Appellee, the Court granted Appellee's Motion for New Trial on June 12, 2015 (CR 51). The State of Texas filed a Notice of Appeal with the Seventh Court of Appeals on June 22, 2015 (CR 55).

On May 19, 2016, the Seventh Court of Appeals affirmed the decision of the 108th District Court as follows:

> "This "new evidence" in the form of the trooper's testimony could not have been available to her before entering her guilty plea on April 28, 2015, when the trooper's testimony did not exist until her co-defendant's suppression hearing on May 4, 2015. The chronology demonstrates that the failure to obtain the evidence was not due to a lack of due diligence. The trooper's testimony was not cumulative, corroborative, collateral, or impeaching. Considering that Appellee's case was pending in the same trial court as her co-defendant's, the trooper's testimony probably would have resulted in a similar ruling if a motion to suppress had been filed in this case, thus resulting in a different outcome in a new trial. We find that Appellee satisfied the four-prong test for a new trial on the basis of newly discovered evidence. She also articulated a valid claim in her motion—the stop of the van was unlawful, produced new evidence to support that claim, and showed her substantial rights were affected. Accordingly, we conclude the trial court did not abuse its discretion in granting Appellee's motion for new trial on the basis of newly discovered evidence. The State's sole issue is overruled."
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> *State v. Arizmendi*, 07-15-00238-CR, 2016 WL 2986041, at *3 (Tex. App.—Amarillo May 19, 2016, pet. granted)

The State filed Petition for Discretionary Review with the Court of Criminal Appeals on June 7, 2016. The Court of Criminal Appeals granted the State's Petition for Discretionary Review on September 14, 2016. The State's Brief on the Merits was filed with the court of Criminal Appeals on October 7, 2016. On October 20, 2016, Darrell R. Carey was appointed by the Court of Criminal Appeals as Counsel for the Appellee Rosa Elena Arizmendi.

ARGUMENT AND AUTHORITIES

COUNTER ISSUE NO. ONE (A).

APPELLEE IS ENTITLED TO A NEW TRIAL, AS BOTH LOWER COURTS HELD, IN SPITE OF THE FACT THAT SHE WAIVED THE RIGHT TO SEEK A NEW TRIAL.

In both the brief for Seventh Court of Appeals and the Court of Criminal Appeals, the State of Texas has asserted that the Appellee waived the right to a new trial by pleading guilty and signing the waivers required by the plea agreement. The State argued that in accordance with *Blanco v. State*, 18 SW 3d 218 (Tex. Crim. App. 2000), that the Appellee waiver of right to appeal is binding no matter what the circumstances. This court has made it clear in the past that it is the trial judges have discretion in granting new trial in the interest of justice. As stated in *State v. Herndon*, 215 S.W.3d 901, 906–07 (Tex. Crim. App. 2007):

> "In *State v. Gonzalez,* 855 S.W.2d 692 (Tex.Crim.App.1993) (plurality op.)[13] we said, "For more than one hundred and twenty years, our trial judges have had the discretion to grant new trials in the interest of justice."[14] We noted that, as early as 1873, the Texas Supreme Court (which, at that time, had criminal jurisdiction), waxed eloquent on the trial court's discretion to grant a new trial in the interest of justice and had stated,
>
> > 'The discretion of the District Court, in granting new trials, is almost the only protection to the citizen against the illegal or oppressive verdicts of prejudiced, careless, or ignorant juries, and we think the District Court[s] should never hesitate to use that discretion whenever the ends of justice have not been attained by those verdicts.[15]'
>
> Historically, we have consistently held that a trial judge has the authority to grant a new trial "in the interest of justice" and that his decision to grant or deny a defendant's motion for new trial is reviewed only for an abuse of discretion.[16] *907 That discretion is not, however, unbounded or unfettered. A trial judge has discretion to grant or deny a motion for new trial "in the interest of justice," but "justice" means in accordance with the law.[17]"

State v. Herndon, 215 S.W.3d 901, 906–07 (Tex. Crim. App. 2007)

The court goes on to state in *Herndon* that:

> "As we have explained before, the test for abuse of discretion "is not whether, in the opinion of the reviewing court, the facts present an appropriate case for the trial court's action; rather, it is a question of whether the trial court acted without reference to any guiding rules or principles, and the mere fact that a trial court may decide a matter within its discretionary authority *908 differently than an appellate court does not demonstrate such an abuse. *Howell v. State,* 175 S.W.3d 786, 792 (Tex.Crim.App.2005) (quoting *Brown v. State,* 870 S.W.2d 53, 55 (Tex.Crim.App.1994))."[23]
>
> *State v. Herndon*, 215 S.W.3d 901, 907–08 (Tex. Crim. App. 2007)

On April 28, 2015, the Appellee plead guilty to a first degree felony Possession with Intent to Deliver a Controlled Substance (CR 33). On May 4, 2015, a Motion to Suppress hearing was held in Cause No. 68,587-E, State of Texas v. Jose Cortez. Jose Cortez was the co-defendant of the Appellee. After hearing the testimony of Trooper Jered Snelegross and considering the arguments of the State and the Defendant, Judge Woodburn granted Defendant Jose Cortez Motion to Suppress and suppressed all evidence connected with the traffic stop executed by Trooper Jered Snelegross (Appendix B, Appellee Brief, 07-15-00238-CR, Tex. App. Amarillo 2015). On May 15, 2015, Appellee filed a Motion for New Trial and Motion in Arrest of Judgment. Appellee's Motion for New Trial and Motion in Arrest of Judgment is based on the fact that the trooper's testimony in Cortez Motion to Suppress Hearing is new evidence which was not available or known at the time the movant plead guilty (CR 45).

As established in TEX. CRIM. PROC. CODE ANN. ART. 40.001 (West), "A new trial shall be granted an accused where material evidence favorable to the accused has been discovered since trial." TEX. CRIM. PROC. CODE ANN. ART. 40.001 (West). On June 9, 2015, the hearing on the Appellee's Motion for New Trial and Arrest in Judgment was held in the 108th District Court. After considering the arguments of both the State and the Appellee, the Court granted Appellee's Motion for New Trial on June 12, 2015 (CR 51). The State argues that the testimony of Trooper

Snelegross during the co-defendant's Motion to Suppress hearing does not constitute new evidence. By simply looking at the timeline of events, it is clear that Appellee could not know about the testimony of Trooper Snelegross at the time of her plea hearing. Appellee also could not know that the Court was going to suppress the evidence in her co-defendant's case at the time of her plea hearing. As stated in *Herndon*, the trial court has the authority to grant a motion for new trial in the interest of justice. It is not logical to state that the Trial Court has the authority to grant permission to appeal in contravention of a prior waiver but then deny the trial court the same power to entertain a timely filed Motion for New Trial based on newly discovered evidence. *State v. Trevino*, 930 S.W.2d 713, 716 (Tex. App.—Corpus Christi 1996, pet. ref'd) reinforces the rights of the trial court to grant a motion for new trial as stated below:

> "We believe that when a trial judge determines that justice has not been done, he has not only the power but also the obligation to order a new trial. Neither the intermediate appellate court nor the Court of Criminal Appeals is vested with such power, so it is imperative that the trial judge exercise this power when necessary."
>
> *State v. Trevino*, 930 S.W.2d 713, 716 (Tex. App.—Corpus Christi 1996, pet. ref'd)

The trial court was deliberate in allowing the Appellee to overcome her waiver of time to file her Motion for New Trial when it granted a hearing on Motion for New Trial. The trial judge is the one who has the power to determine whether or not justice has been done, not the State of Texas. As stated above, the Court of Appeal and Court of Criminal Appeals do not have the power to order a new trial. It is the duty of the trial court judge exercise that power when he feels that justice has not been done. The trial court did not abuse its discretion in granting the Appellee's Motion for New Trial.

COUNTER ISSUE NO. ONE (B).

APPELLEE PRESENTED VALID LEGAL CLAIM SUPPORTED BY NEW EVIDENCE NOT PREVIOUSLY AVAILABLE OR DISCOVERABLE WITH DUE DILIGENCE.

As established in TEX. CRIM. PROC. CODE ANN. ART. 40.001 (West), "A new trial shall be granted an accused where material evidence favorable to the accused has been discovered since trial." TEX. CRIM. PROC. CODE ANN. ART. 40.001 (West). There are specific requirements that the accused must show in regards to a Motion for New Trial based on Newly Discovered Evidence. *Carsner v. State*, 444 S.W.3d 1, 2–3 (Tex. Crim. App. 2014) held as follows:

> "In order for a defendant to be entitled to a new trial on the basis of newly discovered or newly available evidence, the following four-pronged test must be satisfied:(1) the newly discovered evidence was unknown or unavailable to the defendant at the time of trial; (2) the defendant's failure to discover or obtain the new evidence was not due to the defendant's lack of due diligence; (3) the new evidence is admissible and not merely cumulative, corroborative, collateral, or impeaching; and *3 (4) the new evidence is probably true and will probably bring about a different result in a new trial."
>
> *Carsner v. State*, 444 S.W.3d 1, 2–3 (Tex. Crim. App. 2014)

The first prong that must be met is **(1) The newly discovered evidence was unknown or unavailable to the Defendant at the time of trial.** As stated earlier in the brief, the Appellee plead guilty on April 28, 2015 to first degree felony Possession with Intent to Deliver a Controlled Substance (CR 33). On May 4, 2015, a Motion to Suppress hearing was held in Cause No. 68,587-E, State of Texas v. Jose Cortez. As stated earlier, Jose Cortez was the co-defendant of Appellee and was the driver of the vehicle in question. The trooper began to follow the vehicle because the vehicle was very clean, had two people in it, and the vehicle was from California and that they were indicators of potential criminal activity (Page 19, Appendix B, Appellee Brief, 07-15-00238-CR, Tex. App. Amarillo 2015). Trooper Snelegross has the video turned on his dash cam but did not turn on the audio for his dash cam because it was just him in the vehicle (Page 25, Appendix B). Snelegross moved his vehicle into the left lane of traffic as he traveled behind the vehicle so that he could observe what was going on in the vehicle (Page 21, Appendix B). Trooper Snelegross has the video turned on his dash cam but did not turn on the audio for his dash

cam and that he never manual records unless there are extenuating circumstances (Page 26, Appendix B). The trooper pulls closer to the vehicle so that he can run a manual license plate check on the vehicle driving by Jose Cortez (Page 24, Appendix B). Trooper Snelegross testified that he observed the vehicle cross the fog line and executed a traffic stop on the vehicle being driven by Jose Cortez. During the cross examination of Trooper Snelegross the trooper testified that the video did not "greatly" show the traffic violations but with his naked eye that he observed that caused him to initiate the traffic stop (Page 28, Appendix B). The trooper first stated that the vehicle was not making a right-hand turn (CRR 37) but then admits that a right turn was made and properly signaled and that the vehicle pulled in and stopped at the Love's Truck Stop that was located on the right hand side of the road. Even with the video provided by the State, there is no way that the Defendant would have known about testimony of the trooper at the time of her plea on April 28, 2015. The trooper testified on May 4, 2015, after the Appellee's plea hearing. The evidence of Trooper Snelegross testimony was clearly unknown and unavailable to the Appellee at the time of her plea hearing. There is no way that the Appellee would have known about the trial court granting her co-defendant's Motion to Suppress as her plea was on April 28, 2015 and the co-defendant's Motion to Suppress was granted on May 4, 2015. As addressed by the Seventh Court of Appeals, "This "new evidence" in the form of the trooper's testimony could not have been available to her before entering her guilty plea on April 28, 2015, when the trooper's testimony did not exist until her co-defendant's suppression hearing on May 4, 2015." *State v. Arizmendi*, 07-15-00238-CR, 2016 WL 2986041, at *3 (Tex. App.—Amarillo May 19, 2016, pet. granted)

The next prong that must be met is **(2) the defendant's failure to discover or obtain the new evidence was not due to the defendant's lack of due diligence**. The Appellee's plea hearing was on April 28, 2015. At the time of her plea hearing, there was no testimony by

Trooper Snelegross in either her or her co-defendant's case. The testimony of Trooper Snelegross was not given in the co-defendant's case until May 4, 2015. The Appellee had no way of knowing that that trooper began to follow the vehicle because the vehicle was very clean, had two people in it, and the vehicle was from California and that they were indicators of potential criminal activity (Page 19, Appendix B, Appellee Brief, 07-15-00238-CR, Tex. App. Amarillo 2015). Trooper Snelegross has the video turned on his dash cam but did not turn on the audio for his dash cam because it was just him in the vehicle (Page 25, Appendix B). Snelegross moved his vehicle into the left lane of traffic as he traveled behind the vehicle so that he could observe what was going on in the vehicle (Page 21, Appendix B). Trooper Snelegross has the video turned on his dash cam but did not turn on the audio for his dash cam and that he never manual records unless there are extenuating circumstances (Page 26, Appendix B). Because of Trooper Snelegross's not turning on the audio for his dash cam, the Appellee could not have known what his testimony would have been like before her plea hearing on April 28, 2015. There is no way that the Appellee would have known about the trial court granting her co-defendant's Motion to Suppress as her plea was on April 28, 2015 and the co-defendant's Motion to Suppress was granted on May 4, 2015. The Appellee did not fail to discover or obtain favorable evidence at the time of her plea hearing because that testimony of Trooper Snelegross did not exist at the time of her plea hearing and the trial court had not conducted the Motion to Suppress hearing in her co-defendant's case at the time of her hearing. This is addressed by the Seventh Court of Appeals when it stated: "The chronology demonstrates that the failure to obtain the evidence was not due to a lack of due diligence." *State v. Arizmendi*, 07-15-00238-CR, 2016 WL 2986041, at *3 (Tex. App.—Amarillo May 19, 2016, pet. granted).

The third prong that must be met is **(3) the new evidence is admissible and not merely cumulative, corroborative, collateral, or impeaching**. It is clear that Trooper Snelegross's testimony was not cumulative, corroborative, collateral, or impeaching. Trooper Snelegross's testimony was not available at the time of the Appellee's hearing on April 28, 2015, so there his testimony cannot be considered cumulative testimony. There was no way of knowing the testimony of the trooper before he testified on May 4, 2015. With this knowledge, it is clear that the testimony of Trooper Snelegross is admissible new evidence and not merely cumulative, corroborative, collateral, or impeaching evidence. The Seventh Court of Appeals addresses this when it states: "The trooper's testimony was not cumulative, corroborative, collateral, or impeaching." *State v. Arizmendi*, 07-15-00238-CR, 2016 WL 2986041, at *3 (Tex. App.—Amarillo May 19, 2016, pet. granted).

The final prong that must be met is **(4) the new evidence is probably true and will probably bring about a different result in a new trial.** Appellee was the co-defendant of Jose Cortez, who was the driver of the vehicle that Trooper Snelegross initiated the traffic stop on. The testimony of Trooper Snelegross was not given in the co-defendant's case until May 4, 2015. The Appellee had no way of knowing that that trooper began to follow the vehicle because the vehicle was very clean, had two people in it, and the vehicle was from California and that they were indicators of potential criminal activity (Page 19, Appendix B, Appellee Brief, 07-15-00238-CR, Tex. App. Amarillo 2015). Trooper Snelegross has the video turned on his dash cam but did not turn on the audio for his dash cam because it was just him in the vehicle (Page 25, Appendix B). Snelegross moved his vehicle into the left lane of traffic as he traveled behind the vehicle so that he could observe what was going on in the vehicle (Page 21, Appendix B). Trooper Snelegross has the video turned on his dash cam but did not turn on the audio for his dash

cam and that he never manual records unless there are extenuating circumstances (Page 26, Appendix B). Because of Trooper Snelegross's not turning on the audio for his dash cam, the Appellee could not have known what his testimony would have been like before her plea hearing on April 28, 2015. During the cross examination of Trooper Snelegross, the trooper testified that the video did not clearly show the traffic violations that he observed that caused him to initiate the traffic stop. After hearing the testimony of Trooper Jered Snelegross and considering the arguments of the State and the Defendant, Judge Woodburn granted Defendant Jose Cortez of Motion to Suppress and suppressed all evidence connected with the traffic stop executed by Trooper Jered Snelegross (Appendix B, Appellee Brief, 07-15-00238-CR, Tex. App. Amarillo 2015). If the testimony of Trooper Snelegross had been available at the time of her plea hearing, the Appellee would have most likely received a similar ruling if a motion to suppress had been filed in this case and would have resulted in a different outcome in a new trial. The fact is that the evidence was suppressed in her co-defendant's case because the evidence established that the trooper did not lawfully stop the co-defendant's van. As the Seventh Court stated: "Considering that Appellee's case was pending in the same trial court as her co-defendant's, the trooper's testimony probably would have resulted in a similar ruling if a motion to suppress had been filed in this case, thus resulting in a different outcome in a new trial." *State v. Arizmendi*, 07-15-00238-CR, 2016 WL 2986041, at *3 (Tex. App.—Amarillo May 19, 2016, pet. granted).

The trial court and the court of appeals followed the standard as set by *Carsner*. The trial judge is the one who has the power to determine whether or not justice has been done, not the State of Texas. As stated above, the Court of Appeal and Court of Criminal Appeals do not have the power to order a new trial. It is the duty of the trial court judge exercise that power when he feels that justice has not been done. The trial court did not abuse its discretion in granting the

Appellee's Motion for New Trial and the Court of Appeals did not err in Affirming the Judgment of the trial court.

PRAYER.

WHEREFORE, PREMISES CONSIDERED, Appellee prays that the Court of Criminal Appeals affirms the Judgment of the Court of Appeals since the trial court did not abuse its discretion in granting the Appellee's Motion for New Trial and the Court of Appeals did not err in Affirming the Judgment of the trial court.

Respectfully submitted,

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/s/ Darrell R. Carey
DARRELL R. CAREY
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CERTIFICATE OF COMPLIANCE

The undersigned, attorney for appellant, hereby certifies that this Appellee brief is 5,430 words which is in compliance with the Texas Rules of Appellate Procedure Rule 9.4.

/s/ Darrell R. Carey
Darrell R. Carey

CERTIFICATE OF SERVICE

The undersigned, attorney for Appellant, hereby certifies that a true and correct copy of the foregoing APPELLEE'S REPLY BRIEF was on the 21st day of November, 2016, served as follows:

____ (a) by delivery in person;
____ (b) by agent or courier receipted delivery;
_____(c) by certified mail, return receipt requested;
__X__(d) by facsimile or electronic service

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